

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

|   |   |                    |
|---|---|--------------------|
| <b>TIM D. CASE</b>                      | ) |                    |
| Claimant                                | ) |                    |
| VS.                                     | ) |                    |
|   | ) | Docket No. 250,279 |
| <b>WICHITA SOUTHEAST KANSAS TRANSIT</b> | ) |                    |
| Respondent                              | ) |                    |
| AND                                     | ) |                    |
|   | ) |                    |
| <b>LIBERTY MUTUAL INSURANCE COMPANY</b> | ) |                    |
| Insurance Carrier                       | ) |                    |

**ORDER**

Claimant appeals the May 4, 2001, Award of Administrative Law Judge Steven J. Howard. Claimant contends he is entitled to a work disability after his termination from respondent. Respondent, on the other hand, contends that claimant's termination was justified as claimant's random drug sample test was returned, showing an adulterated test sample. The Board held oral argument on October 23, 2001.

**APPEARANCES**

Claimant appeared by his attorney, Timothy A. Short of Pittsburg, Kansas. Respondent and its insurance carrier appeared by their attorney, John M. Graham, Jr., of Overland Park, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

The Appeals Board has considered the record and adopted the stipulations contained in the Award of the Administrative Law Judge.

**ISSUES**

What is the nature and extent of claimant's disability? And, more particularly, is claimant's entitlement to a permanent partial disability award limited to his functional

impairment resulting from the termination for cause after claimant's random drug test was returned showing the test sample had been adulterated?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary record filed herein, the Appeals Board finds that the Award of the Administrative Law Judge should be affirmed.

Claimant, a truck driver for respondent, suffered accidental injury on February 22, 1999, when he injured his low back after he slipped and fell on some ice while working in Des Moines, Iowa. Claimant underwent surgery on his back by Kevin M. Mosier, M.D., an orthopedic surgeon, and was released to return to work with respondent in October 1999. On October 26, 1999, claimant underwent a random drug test, which is required by the Department of Transportation regulations.

The test results, admitted as Respondent's Exhibit A at the regular hearing without objection, showed that the sample taken from claimant was adulterated. The DOT regulations dealing with test samples, placed into evidence during the deposition of Marsha L. Ogle, respondent's Director of Human Resources, specify that, when a test specimen is returned as adulterated, that is the same as if an employee refused to take the test. This also results in a retest being denied to the donor.

As a result of this adulterated test sample, respondent, pursuant to its company policy, terminated claimant from its employment.

Claimant first contends that the test results were not adequate to support claimant's termination and should not have resulted in a denial of work disability. However, the test results show claimant's test was adulterated. Any objection made by claimant before the Board regarding the test results and any chain of custody objections or testing procedure objections are untimely. Objections to the test results should have been raised at the time the report was offered into evidence at regular hearing.

Claimant argued that he requested, on many occasions, additional information from respondent regarding the method of performing the tests and the test results themselves, but was provided no additional information. However, there was never a request to the Administrative Law Judge nor was there any order requiring respondent to provide additional information.

In this instance, the Appeals Board finds that sufficient evidence was provided by respondent to create a prima facie case that claimant's termination from employment with

respondent was the result of the adulterated drug sample. This uncontradicted evidence is sufficient to convince the Board that claimant's termination was made in good faith.

Additionally, claimant returned to work with respondent at a comparable wage. The Board finds claimant's actions here were tantamount to a refusal to work. Therefore, the wage claimant was earning with respondent should be imputed to claimant after his termination for cause. Accordingly, claimant's award should be limited to his stipulated functional impairment of 14 percent to the body as a whole. See Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

Claimant objected to the opinion of Dr. Mosier regarding what, if any, task loss claimant suffered. While this issue is rendered moot by the above finding, the Board will address this issue for purposes of appeal.

Vocational experts Jerry D. Hardin and Gary Weimholt examined claimant to assess what, if any, task loss claimant has suffered under K.S.A. 1998 Supp. 44-510e. Both Mr. Hardin and Mr. Weimholt prepared a list of tasks which claimant had performed over the 15 years preceding the accident.

The report of Mr. Hardin was provided to Edward J. Prostic, M.D., board certified orthopedic surgeon, at his deposition on November 6, 2000. Based upon that report, Dr. Prostic provided an opinion as to what, if any, task loss claimant suffered. The task report from Mr. Weimholt was provided to Dr. Mosier at his deposition on January 29, 2001. Claimant objected, as the report from Mr. Weimholt was not provided prior to Dr. Prostic's deposition. There was no discovery order on file. Nevertheless, claimant argued entitlement to that report before Dr. Prostic's deposition, but provided no statutory or case law support for that argument.

The Board is unaware of any statutory or regulatory provision that, in the absence of an order, requires a vocational vendor's report be provided to opposing counsel before it is used at trial. The report was provided to claimant's counsel at the time of Dr. Mosier's deposition. There is no indication in the record that claimant requested the report or that an order was requested from or issued by the Administrative Law Judge requiring that the report be provided to counsel. Had such a request been made or such an order issued, claimant's argument would have merit. However, that is not the case here.

In workers compensation litigation, the burden of proof is on claimant to prove his entitlement to benefits by a preponderance of the credible evidence. Here, claimant has failed to prove that he is entitled to any award beyond the 14 percent whole body functional

disability stipulated by the parties. The Appeals Board, therefore, finds that the Award of the Administrative Law Judge should be affirmed.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard, dated May 4, 2001, should be, and is hereby, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November, 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Timothy A. Short, Attorney for Claimant  
John M. Graham, Jr., Attorney for Respondent  
Steven J. Howard, Administrative Law Judge  
Philip S. Harness, Director